No. 3587

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

JAMES E. CARR, *Plaintiff in Error,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Defendant in Error.*

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

CHAS. W. JOHNSON,
Pasco, Washington,
Attorney for Plaintiff in Error.

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Attorneys for Defendant in Error.

I.

MOTION OF DEFENDANT IN ERROR TO STRIKE TRANSCRIPT OF RECORD AND TO DISMISS WRIT OF ERROR.

The defendant in error can make no better statement than is made in Exhibit "C" by his Honor, Frank H. Rudkin, District Judge, page 14 of Motion to Strike. In support of said motion we cite—

> *Mound Coal Company vs. Jeffrey Manufacturing Company,* 233 Fed., 913 at the point being discussed on pages 918 and 919.

That case and the decisions therein cited we deem conclusive.

Respectfully submitted,

E. J. CANNON,
FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.

II.

ON THE MERITS.

STATEMENT.

(Numerals in brackets refer to pages of Transcript of Record.)

(Herein plaintiff in error will be designated plaintiff, and defendant in error, defendant.)

Not having received copy of brief of plaintiff we submit statement of facts.

This is a personal injury action brought by plaintiff against the Northern Pacific Railway Company, defendant, to recover damages which he claims to have suffered by reason of an operation for appendicitis performed upon him in January, 1913, by the Chief Surgeon of the Tacoma hospital of the Northern Pacific Beneficial Association. While employed as one of its conductors plaintiff was stricken with appendicitis and voluntarily went to the Northern Pacific Beneficial Association hospital (99) and was there operated upon. The result was unsatisfactory. It is not claimed that the defendant was negligent in any manner, nor is it claimed that the Beneficial Association was in any

manner negligent in the selection or employment of its surgeons. Neither was it claimed that these surgeons were incompetent, but only that they, or one of them, was negligent. (99, 100.)

Some thirty-eight years ago (66) the employes of the Northern Pacific Railway Company formed an association known as the Northern Pacific Beneficial Association, to which association each employe of the railway company paid each month a small percentage of his salary, depending upon his earnings (73). These monies are collected by the railway company and turned over to the Beneficial Association (66, 104). With the fund so raised a line of hospitals was built and equipped and a staff of surgeons employed and placed in charge who, in turn, appointed internes and nurses. As the number of employes of the railroad increased the funds increased and the hospitals were enlarged and extended. They are owned by the association and the defendant has no part in that ownership (66, 69, 101-107 inclusive). To manage the several hospitals the employes continue to elect, at an election had every year or two years, a man from each department of the railway service (97, 98). These men so elected constitute a board and they

select the officers of the association. The railway company derives no profit whatever from the association (103). On the other hand, it has contributed sums of money each year to make up deficiencies. At the present it contributes fifty thousand dollars per year (103). The manner of collecting the monies is as follows: The railway company deducts from the salaries of the employes, and Mr. Mayer, the Assistant Auditor of the Company, turns over to Mr. Laidlow, the Secretary of the Beneficial Association, a check for the monies so collected. This is done without charge (106).

The defendant in its answer to the plaintiff's complaint set forth these facts (page 2, answer) and contends that it is in no manner responsible for negligent acts, if any, of a surgeon of the Beneficial Association, or any of its employes, and therefore that, assuming a surgeon was negligent the railway company is not in any manner responsible for that negligence.

The alleged negligence occurred in January, 1913, and the action was begun more than six years afterwards. In the complaint it was alleged that the defendant's neglect continued to the year 1919, but

no evidence of such continuance was introduced, and that allegation was manifestly made to avoid the three-year statute of limitations, and being unable to show negligence of anyone, after the operation, attempt to prove continuing negligence was abandoned.

The case was tried, these facts duly proven, and a motion made at the close of the testimony that the court instruct the jury to return a verdict for the defendant, which motion was granted.

ARGUMENT.

Defendant contends as follows:

First: Even assuming that the hospitals in question were owned by the railway company and the surgeons appointed by that company, the defendant would not be liable if it exercised reasonable care in the selection of the surgeons, since defendant derived no profit from the maintenance of these hospitals.

Second: Since the hospitals of the association are maintained by the members for their mutual benefit in case of illness or incapacity, the fund which they each contribute is a trust fund which cannot be broken into by one to compensate him for

the alleged negligence of an employe who is his agent as well as the agent of his associates.

Third: Since it appears that the defendant herein is not one of the members of the association, has no voice in its management or in the selection of its officers, the defendant is not subject to the doctrine of *respondeat superior.*

We discuss these questions together.

Institutions of the character of the Northern Pacific Beneficial Association are numerous and of great benefit to their members. A small sum is each month contributed by each member which, with a great number of other like contributions, make up a sufficiently large sum to enable the contributors to build and equip great institutions. The fund created is a trust fund for the benefit of all. To allow one to directly divert this fund to compensate him for the tortious or negligent acts of the servants of the association is to thwart the intentions of the contributors.

> 5 *Am. & Eng. Encyc. of Law,* 2d Edition, 923.

The funds and property thus acquired are held in trust and cannot be diverted for the purpose of

paying damages for injuries caused by the negligent or wrongful act of its servants and employes to persons who are enjoying the benefit of the fund.

Parks vs. Northwestern University, 218 Ill., 381.

Surely if the association is not liable for the alleged negligence of its servants the railway is not liable for the acts of one whom it had no part in selecting. Indeed, it is well established that if the defendant employed this surgeon for the benefit of its men and without profit to itself it would not be liable for the malpractice or negligence of the surgeon, if it used reasonable care in his selection.

Engibritson vs. Tri State Cedar Co., 91 Wn., 297, page 283 and cases cited.

The rule is that those who furnish hospital accommodations and medical attention, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own ordinary care in selecting them.

Union Pacific R. R. Co. vs. Artist, 60 Fed., 365.

The above case seems to be exactly in point except that the Union Pacific Railroad Company maintains hospitals with funds of its employes entrusted to the company to administer. The defendant herein is further removed. Its men furnish the funds, elect their own officers and through such officers administer their own funds. The railway company has no part in the affairs of the association except to aid it by a contribution to the funds.

Circuit Judge Sanborn leaves nothing unsaid in his opinion, and we might well rest our case upon that decision alone. On pages 367, 368, 369 and 370 the subject is exhausted, and in the later case of—

Pearce vs. Union Pacific R. R. Co., 56 Fed., 44,

the rule is affirmed.

The Circuit Court of Appeals for the First Circuit in *Powers vs. Mass. Homeopathic Hospital,* 109 Fed., 294, delivers a masterly opinion wherein the question is gone into at great length. The reasons for the different decisions are set forth, and on page 298 the Court says:

> "So far as known, there is no case which affirms the liability of the railroad under the circumstances stated."

In that case the surgeon was employed directly by the defendant. Other cases so holding are:

Parks vs. Northwestern University, 75 N.E., 991 (Ill.);

Wells vs. Lumber Company, 57 Wn., 658;

Richardson vs. Carbon Hill Coal Co., 10 Wn., 648;

Symon vs. Hamilton Toggin, 76 Wn., 370;

Wharton vs. Warner, 75 Wn., 470-476.

Attempt is made by counsel for plaintiff to have the inference drawn that the railway in some manner profits by the establishment of these hospitals and the appointment of the surgeons. In this he has failed. The doctors of the association when they render any service in the treatment of strangers, are paid for those services by the railway (107, 108). If he had succeeded, however, the result must be the same. The association is entirely separate from the railway company, managed and controlled by the employes, who elect their officers by popular vote (104), in no way the agent or cre-

ature of the railroad. The doctrine of *respondeat superior* cannot be invoked in such a case. The application of the doctrine "Let the principal answer" has no bearing unless there exists in some form the relation of master and servant or principal and agent. The work carried on in these hospitals is for the benefit of all who contribute as members. Its work is theirs and its mistakes they must bear.

For these reasons, somewhat briefly stated, the judgment of the lower court should be affirmed.

Respectfully submitted,

E. J. CANNON,
FRANCIS J. McKEVITT,

Attorneys for Defendant in Error.